


THE SECRETARY OF EDUCATION  
WASHINGTON, DC 20202

September 27, 2021

MEMORANDUM

TO: Office of Management and Budget (OMB)

FROM: Miguel A. Cardona 

SUBJECT: U.S. Department of Education Contingency Plan for Lapse  
in Fiscal Year (FY) 2022 Appropriations

The contingency plan for the U.S Department of Education (the Department) was developed pursuant to applicable legal requirements governing a Federal lapse in appropriations. In the event of an interruption or absence of an appropriation (lapse) or continuing resolution, the Department, in the interim, will only perform work that is supported by budget authority that does not require congressional action pursuant to an annual appropriations Act to establish the availability of funds. Examples of such budget authority are: appropriations provided in permanent law, advance appropriations provided in prior-year appropriations Acts, balances from multi-year or no-year appropriations, or authority that otherwise supports an activity that is considered an “exception” to the Antideficiency Act and “excepted” to continue during a lapse in appropriations. As set forth in this plan, the Department would furlough more than 90 percent of its total staff for the first week of such a lapse. During this first week, we would maintain only those staff needed to perform excepted functions related to: (1) the discharge of the duties of presidentially appointed, Senate-confirmed individuals; (2) protection of life and property; and (3) as appropriate, activities necessarily implied by law such as the obligation, payment, and support of student financial aid, as well as other authorized payments and obligations.

If the lapse lasts longer than a week, the Deputy Assistant Secretary, Office of Budget Service for Finance and Operations would be responsible for adjusting the plan to respond to the length of the lapse in appropriations and changes in external circumstances. The Assistant Secretary for Finance and Operations would be responsible for implementing the adjusted plan. The Department would phase in employees only as necessary to support and prevent significant damage to the underlying activity. At most, not more than 11 percent of the total staff would be called back to work during a longer interruption. Some employees would be called in on a partial or rotating basis; the combined number of excepted employees working at any given time would not exceed approximately 11 percent of the Department’s total full-time equivalents (FTEs). As of the beginning of September 2021, the Department employed 4,091 full- and part-time employees.

This contingency plan for the Department, like the 1996, 2011, 2013, 2016, 2017, 2018, 2019, 2020, and 2021 plans, would authorize certain categories of employees (“excepted employees”) to work in the absence of a specific appropriation.

**1. Necessary to Ensure an Orderly Shutdown**

Immediately upon receiving notification of a lapse in appropriations, the Department would direct employees to be entirely devoted to “closing down” their individual and group work functions. The

Department would ensure that employees' orderly shutdown activities would be completed within a relatively short period (no more than 4 hours for most employees). The non-excepted employees would then be released on furlough. Examples of shutdown activities include:

- Performing payroll functions and processing travel vouchers for the period just prior to the appropriations lapse;
- Completing inventories of property;
- Securing Federal property;
- Performing personnel functions to process furlough notices;
- Setting up consistent voicemail and email out-of-office messages;
- Notifying grantees of any impact on the disbursement of funds; and
- Notifying contractors as to whether they will be required to stop work.

## **2. Authorized by Law**

Each of the Department's confirmed Presidential appointees subject to Senate confirmation (PAS), and one (1) additional FTE identified by each PAS, would be excepted from the furlough. Each of the Department's PAS would determine, based on their specific needs, which employee(s) would report for duty as the PAS' one additional FTE to provide support in carrying out excepted activities. The PAS may identify and name one or more employees to provide support so long as the total period of work performed by the employee(s) on any given day does not exceed the total of one FTE. For example, the PAS could identify the same person each day, more than one individual each day, or any other combination totaling at most one FTE each day. These employees may also be incidentally involved in non-excepted activities (not to exceed one-eighth of the time in each eight-hour day). In the case of the Secretary, additional personnel comprising up to seven FTEs may be deemed excepted depending on the Secretary's excepted activities for the days involved. As an example, in past shutdowns, additional staff members were excepted so that they could appear in judicial proceedings. The total number of FTEs excepted for this purpose is shown in the chart, "Lapse Plan Summary Overview," at the end of this document. Individuals who are delegated the authority to perform the functions and duties of a PAS employee are excluded.

## **3. Necessary to Protect Life or Property**

The Department engages in certain regular, ongoing functions (such as facilities, personnel, and information technology security) the suspension of which would pose a threat to life or property. The Department's Office of Finance and Operations would generally coordinate and direct these activities with additional support from the Office of the Chief Information Officer and the Office of the Secretary. The Office of Inspector General (OIG) would also except personnel to engage in law enforcement functions, the suspension of which would pose a threat to the protection of property and resources, affect ongoing criminal investigations, and impede the execution of search warrants and arrests. All of OIG's excepted law enforcement personnel would report to duty on an as-needed basis and only to meet critical needs as approved by OIG. The number of FTEs excepted for this purpose is shown in the chart, "Lapse Plan Summary Overview."

The Department's approach is mostly consistent with that taken in 1996 as it relates to the protection of life and property. However, there would be additional excepted FTEs based on changes in national security functions for the Federal Government since 1996 and for law enforcement purposes. Like the 2011, 2013, 2016, 2017, 2018, 2019, 2020, and 2021 plans, we are including this category as a separate item in the "Lapse Plan Summary Overview" chart.

#### **4. Funded from an Alternative Source**

Programs using mandatory or advance appropriations, or unobligated multi-year or no-year funds from a prior year (carryover) would continue to operate through a government shutdown. For these programs, staff may be brought in on an excepted basis to make payments for the following activities:

##### **A. Grant and Loan Programs**

Programs with mandatory funding can make obligations and payments during a shutdown. Examples of such programs include Pell Grants and Federal Direct Student Loans. In addition, approximately 36 non-mandatory programs have advance funds appropriated in FY 2021 that will become available in FY 2022 and/or have authority to carry over and use remaining unexpired, unobligated balances from FY 2021 multi-year or no-year discretionary appropriations. Obligations and payments from these programs may continue, depending on the length of the lapse and availability of funds. Only those grant activities that, if not continued, would prevent or significantly damage the execution of funded functions (the “significant damage” standard) will continue on a limited basis after a lapse of one week and continue through a short-term shutdown. Examples of significant damage could be disruption of local educational agency operations or inability of students to obtain necessary higher education financing.

For programs meeting the significant damage standard, employees could be brought into work as “excepted employees” to provide payments and fulfill obligations to grantees and other recipients. The number of excepted staff will vary depending on the length of the shutdown and amount of money and number of recipients involved. These numbers include employees in the program and support areas. In each case, only the minimum number of employees needed would be brought in to work. The table at the end of this document specifies the number of excepted FTEs necessary in week one and the maximum number needed for weeks two through four for these activities. It is assumed that the G-5 system for making payments to grantees – either grants awarded in prior years or those made with mandatory or carryover appropriations – would continue to operate at least for the first week. For a lapse of more than a week, Department staff would be needed as excepted employees to resolve any issues necessary to prevent significant damage to the underlying activity.

Non-mandatory programs that do not have available unobligated balances from FY 2021 may not incur new obligations while under a government shutdown caused by a lapse in appropriations.

##### **B. Direct Loans and Pell Grants**

A lapse in appropriations could fall at a critical point in the administration of the large student aid programs. Program funds for Pell Grants and Direct Student Loans are provided through mandatory and carryover appropriations. Nearly 10.8 million students receive student aid, in the form of grants and loans, at more than 5,600 schools through these programs. As a result of the permanent and multi-year appropriations, some basic operations (such as processing Free Applications for Federal Student Aid, FAFSA®, disbursing Pell Grants and Federal Direct Student Loans, and servicing Federal student loans) could continue for a very limited time; these operations could also experience some level of disruption due to a lapse. Excepted staff and contractors associated with these programs will continue to work as appropriate; only skeletal program operations would continue under the significant damage standard. Should multi-year, unobligated funding be available, these funds could help cover costs for a period of time.

Federal Student Aid’s (FSA’s) Chief Operating Officer and other management officials across the Department responsible for Pell Grants and Direct Student Loans will designate the minimum number of employees necessary to keep these programs operational. These could include employees needed to

obligate and process payments, maintain systems necessary to disburse Pell Grants and student loan payments, and provide legal counsel in FSA and other offices. For the short term, these employees would continue to work. FSA employees working in areas not directly related to Pell Grants or Direct Student Loans, such as Federal Work-Study and Supplemental Educational Opportunity Grants, customer service activities, administrative functions not related to providing student aid to schools and students, and development of new programs or activities, would not be excepted.

### C. COVID Supplemental Programs and Administration

Programs and activities authorized and funded through the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (CRRSAA) and the American Rescue Plan (ARP) have authority to carry over and use remaining unexpired, unobligated balances from FY 2021. In addition to program funding, this may include compensation for staff administering the programs. Obligations and payments from these programs and activities may continue. In addition, unexpired funds appropriated to the Office of Inspector General through the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) for salaries and expenses necessary for oversight and audit of programs, grants, and projects funded in the CARES Act may be carried over into FY 2022, allowing authorized activities to continue.

#### Effect of Shutdown Caused by a Lapse in Appropriations

A protracted delay in Department obligations and payments beyond one week would severely curtail the cash flow to school districts, colleges and universities, vocational rehabilitation agencies, and other entities that depend on the Department's discretionary funds to support their services. For example, roughly 1 in 10 school districts receive more than 15 percent of their funds from Federally funded programs. Colleges rely on Department funds to pay ongoing expenses of staff running programs for disadvantaged students seeking to enter and stay in college. Vocational rehabilitation agencies receive more than 70 percent of the cost of providing services to adults and youth with disabilities from the Department's program.

Under a shutdown, the potential disruption to Department grant programs would be a delay in activities necessary to make competitive and formula grant awards later in the fiscal year. For the most part, the employees who do this work will be furloughed. In addition, grantees and the public seeking specific information regarding the impact of a shutdown will have limited access to information.

Some contractors could continue to work under a lapse in appropriations for some short period of time. However, during an interruption, no new contracts would be awarded unless they were significantly related to excepted activities. Contractors receiving recently awarded contracts may be ordered to stop work during the furlough, since Department staff will not have had enough time to provide initial direction to these contractors. Those contractors allowed to continue their work would not immediately receive payment for their services, but the Department would be obligated to make payment, along with any Prompt Payment Act interest to compensate for the delay, once funds were available.

The chart below is illustrative and is based on our current thinking of what would happen if an interruption were to occur on October 1, 2021. Staffing levels for the first week of a lapse in appropriations include only PAS employees and those who would perform certain functions or whose furlough would pose a threat to life or property.

Beyond the first week of a lapse, our planning generally contemplates a continuation of those minimal, skeletal functions and resulting personnel levels that are necessary when the significant damage standard is met. The Department will phase in employees as necessary to conduct excepted activities that are funded by other than FY 2022 appropriations or are mandatory.

If the lapse lasts more than one week, the total number of employees working at some point during the shutdown would be approximately 408 FTE; approximately 3,683 employees would be furloughed. The FTE and employee numbers in this plan reflect levels at the beginning of September 2021.

#### Actions Necessary to Resume Orderly Operations

When directing employees to “close down” their individual and group work functions, the Department will provide information to employees to monitor the status of appropriations. This information will include links to OMB websites that will provide updates on the status of agency appropriations. Employees will also be informed that they will be expected to return to work the workday following resolution of conditions that led to the shutdown. After resumption of orderly operations, supervisors will be informed of their ability to offer leave flexibility to employees who may not have returned to work as scheduled due to extenuating circumstances.

Lapse Plan Summary Overview		
	Department of Education	Office of Federal Student Aid only
Estimated time (to nearest half day) needed to complete shutdown activities:	0.5 days	0.5 days
Total number of agency employees expected to be on board before implementation of the plan:	4,091	1,419
<b>Total number of employees to be retained under the plan for each of the following categories:</b>		
Compensation is financed by a resource other than annual appropriations:	134	38
Necessary to perform activities expressly authorized by law:	44	0
Necessary to perform activities necessarily implied by law:	227	200
Necessary to the discharge of the President’s constitutional duties and powers:	9	0
Necessary to protect life and property:	20	3
<b>Brief summary of significant agency activities that will continue during a lapse:</b>		
Department of Education programs with mandatory funding can make obligations and payments during a shutdown. Examples of such programs include Pell Grants and Federal Direct Student Loans. Approximately 36 non-mandatory programs have advance funds appropriated for FY 2021 that will become available in FY 2022 and/or remaining unexpired, unobligated balances from FY 2021 multi-year or no-year discretionary appropriations. Obligations and payments from these programs may continue, depending on the length of the lapse and availability of funds. This applies as well to COVID-supplemental programs or activities authorized through the CARES Act, CRRSAA, and ARP for which funds are available in FY 2022. Only those grant activities that, if not continued, would prevent or		

significantly damage the execution of funded functions (the “significant damage” standard) will continue on a limited basis after a lapse of one week and continue through a short-term shutdown.

**Brief summary of significant agency activities that will cease during a lapse:**

During a lapse, the Department of Education would pause most of its grantmaking activities, including the development of grant announcements, review of grant applications, and awarding of grant funds. The Office for Civil Rights would also pause its review and investigations of civil rights complaints. The Department’s development and implementation of guidance, technical assistance, and regulatory actions would also pause during a lapse.